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No. 116

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

DONALD S. HOSTETTER, WILLIAM H. MORGAN, ROBERT E. DOYLE, JOHN C. HART and BENJAMIN H. BALCOM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,

Appellants,

v.

IDLEWILD BON VOYAGE LIQUOR CORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	3
The Questions Presented Are Substantial	8
APPENDIX:	
Opinion of the Three-Judge Statutory Court	23
Final Judgment of the Court Below	43
Defendants Counter-Proposed Final Judgment	45
Federal and State Statutes	48

CITATIONS

Cases:

Brenner v. *O'Connell*, 308 N. Y. 636, 127 N. E. 2d 715 (1955) 5, 15

California v. *Washington*, 358 U. S. 64 (1958) 9

Carter v. *Virginia*, 321 U. S. 131 (1944) 10, 11, 13

Delamater v. *South Dakota*, 205 U. S. 93 (1907) 13

Duckworth v. *Arkansas*, 314 U. S. 390 (1941) 11, 14

Evers v. *Dimino*, 186 Misc. 136, 61 N.Y.S. 2d 504 (1946) 5

Finch & Co. v. *McKittrick*, 305 U. S. 395 (1939) 9, 10

General Sales and Liquor Co. v. *Becker*, 14 F. Supp. 348 (E. D. Missouri, 1936) 9

PAGE

Gordon v. *Texas*, 355 U. S. 369 (1958), affirming 166 Tex. Cr. R. 24, 310 S. W. 2d 328 12

Idlewild Bon Voyage Liquor Corp. v. *Epstein*, 368 U. S. 812 (1961) .....

370 U. S. 713 (1962) 1, 7

212 F. Supp. 376 (1962) 1, 7

Idlewild Bon Voyage Liquor Corp. v. *Rohan*, 188 F. Supp. 434 (1960) 1, 6

194 F. Supp. 3 (1961) 1

289 F. 2d 426 (1961) 1

Indianapolis Brewing Co. v. *Liquor Control Commission*, 305 U. S. 391 (1939) 9, 10

Lipshitz v. *T. & D. Wines and Liquors, Inc.*, 190 Misc. 261, 75 N.Y.S. 2d 321 (1947) 5, 15

Mahoney v. *Triner Corp.*, 304 U. S. 401 (1938) 9, 10

State Board of Equalization v. *Young's Market Co.*, 299 U. S. 59 (1936) 7, 10

Stratton v. *St. Louis S.W.R. Co.*, 282 U. S. 10 6

U. S. v. *Frankfort Distillers*, 324 U. S. 293 (1945) ... 19

Washington Brewers Institute v. *United States*, 137 F. 2d 964 (9 Circ., 1943) 19

Wylie v. *State Board of Equalization*, 21 F. Supp. 604 (S. D. California, 1937) 9

Ziffrin, Inc. v. *Reeves*, 308 U. S. 132 (1939) 9, 12

United States Constitution:

Article I, § 8 ..... 3, 8

Amendment XXI, § 2 ..... 3, 8

PAGE

Statutes:

19 U.S.C. § 1311 (§ 311 of the Tariff Act of 1930) . . 2, 3, 16, 17, 20

27 U.S.C. § 121 18

27 U.S.C. § 122 18

27 U.S.C. c. 8 18

§ 204 (d) 19

§ 204 (a) 2 (C) 19

28 U.S.C. § 1253 2

28 U.S.C. §§ 2281, 2284 ..... 2, 6

New York Alcoholic Beverage Control Law:

§ 3 subd. 28 ..... 2, 3, 4, 7, 13

§ 17, subd. 2 ..... 5, 15

§ 62 ..... 2, 7

§ 65 15

§ 100 subd. 1 ..... 2, 3, 5, 7, 13

§ 100 subd. 2 2

§ 101 subd. C (5) 16

§ 105 subds. 2, 3, 4, 14, 15 ..... 5, 15

§ 110 subd. 4 15

In the

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Donald S. Hostetter, William H. Morgan, Robert E. Doyle, John C. Hart and Benjamin H. Balcom, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,

Appellants,

v.

Idlewild Bon Voyage Liquor Corporation,

Appellee.

JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the three-judge district court sought to be reviewed is reported at 212 F. Supp. 376, and is reprinted in the Appendix to this statement at pp. 23-42.

The prior opinion of this Court, dated June 25, 1962, remanding this case to the district court is reported at 370 U. S. 713. That opinion was rendered upon review, by way of writ of mandamus, of the opinions of Judge Bicks, dated November 4, 1960 (R. 195), reported at 188 F. Supp. 434, Judge Dimock, dated December 28, 1960 (R. 204), not officially reported, and Judge Cashin, dated May 3, 1961 (R. 217), reported at 194 F. Supp. 3, and also upon writ of certiorari to the Court of Appeals for the Second Circuit, whose decision is reported at 289 F. 2d 426 (R. 225).

Jurisdiction

This proceeding was brought by appellee in the United States District Court for the Southern District of New York pursuant to 28 U.S.C. §§ 2281 and 2284 for injunctive relief and for an adjudication that the Constitution and laws of the United States preclude the application of the New York Alcoholic Beverage Control Law to appellee's operations. The three-judge district court, by judgment dated and entered on February 5, 1963, declared that the application to appellee of the New York State Alcoholic Beverage Control Law § 3, subd. 28, § 62 and § 100, subds. 1 and 2, is repugnant to the Commerce and Supremacy Clauses of the Constitution of the United States, and permanently enjoined the appellants from applying and enforcing the foregoing sections against the appellee and its operations. A notice of appeal to this Court was filed in the United States District Court for the Southern District of New York on March 13, 1963. Jurisdiction of this Court to review on direct appeal the judgment of the three-judge district court is conferred by 28 U.S.C. § 1253.

Questions Presented

1. Whether the application to appellee, a New York corporation engaged in the purchase and importation of intoxicating liquors from out-of-State wholesalers for resale to departing airline passengers at its private premises in the State of New York, of § 3, subd. 28, § 62 and § 100, subds. 1 and 2 of the New York State Alcoholic Beverage Control Law—which require an appropriate state license to sell alcoholic beverages at wholesale or retail and forbid the sale or delivery of alcoholic beverages for the purpose of resale to anyone not duly licensed—violates § 311 of the Tariff Act of 1930 as amended (19 U.S.C. § 1311), and the

Commerce and Supremacy Clause of the Constitution of the United States.

2. Whether the operations of the appellee are subject to the liquor control laws of the State of New York by virtue of the Twenty-first Amendment to the Federal Constitution.

Constitutional and Statutory Provisions Involved

United States Constitution, Art. I, § 8:

> "The Congress shall have power, * * * 3. To regulate commerce with foreign nations and among the several States, and with the Indian tribes."

United States Constitution, Amendment XXI, § 2:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

§ 311 of the United States Tariff Act of 1930, as amended (19 U.S.C. § 1311), is set forth in the Appendix, *infra*, pp. 48-51.

New York Alcoholic Beverage Control Law § 3, subd. 28, § 62, and § 100, subds. 1 and 2, are set forth in the Appendix, *infra*, pp. 52-53.

Statement of the Case

Appellee, a New York corporation, is in the business of selling bottled wines and liquors—foreign as well as domestic—to international airline passengers at its office located on the second floor of the Arrivals Building at New York International Airport in the City and State of

New York.[1] Appellee purchases its entire supply of liquors outside the State of New York (R. 153) from wholesalers located in Philadelphia, Baltimore, and Washington, D. C. (R. 71). The liquors thus purchased are transported into New York and stored in the rear of appellee's private office in the Arrivals building (R. 81-82) until orders for their resale to airline passengers have been received and paid for at appellee's office (R. 135-138). The wines and liquors are then allegedly placed upon the passengers' planes for delivery to the passengers upon arrival at their foreign destination.

The appellee commenced its liquor operations at New York International Airport in April, 1960 (R. 99). In response to appellee's inquiry as to the applicability of the New York liquor control laws, the New York State Liquor Authority, by letter dated July 11, 1960, informed appellee that its business was illegal under the provisions of the New York Alcoholic Beverage Control Law. This conclusion was based upon an opinion of the Attorney General of the State of New York attached to said letter, which stated that appellee was engaged in "selling" alcoholic beverages within the meaning of § 3, subd. 28[2] of the

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[1] Appellee's premises are not located on Federal territory. Although appellee leases its space at the Arrivals Building from the Port of New York Authority, appellee's premises are fully subject to the territorial jurisdiction of the State of New York, as the court below recognizes in Footnote 4 of its opinion. Appellee also leases space in the Pan American and T.W.A. terminal buildings at the airport where orders for the sale of liquor are taken (R. 60).

[2] New York Alcoholic Beverage Control Law, § 3, subd. 28, provides:

> "'Sale' means any transfer, exchange or barter in any manner or by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and/or a warehouse receipt pertaining thereto. 'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state."

Alcoholic Beverage Control Law, and that its business would therefore be illegal in the absence of the license required by § 100, subd. 1 of that Act.[3] The Attorney General's opinion also cited Rule 17 of the Rules of the State Liquor Authority which provides that no additional licenses be issued within the counties of the City of New York for sale at retail of alcoholic beverages for off-premises consumption.[4] Even if the Liquor Authority were to amend Rule 17 for the purpose of licensing appellee's particular operation, the Attorney General noted that appellee's premises as presently constituted did not physically meet the statutory provisions of § 105, subd. 2 requiring an entrance from the street level and a location on a public thoroughfare.[5]

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[3] New York Alcoholic Beverage Control Law, § 100, subd. 1, provides:

> "No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter."

[4] Rule 17 of the Rules of the State Liquor Authority was enacted pursuant to § 17, subd. 2 of the Alcoholic Beverage Control Law which empowers the Liquor Authority "to limit in its discretion the number of licenses of each class to be issued within the state or any political subdivision thereof * * *". The Liquor Authority's right under Rule 17 to refuse to issue new licenses was upheld by New York's highest court in *Brenner* v. *O'Connell*, 308 N. Y. 636, 127 N. E. 2d 715 (1955).

[5] New York Alcoholic Beverage Control Law, § 105, subd. 2, provides:

> "No premises shall be licensed to sell liquors and/or wines at retail for off premises consumption, unless said premises shall be located in a store, the entrance to which shall be from the street level and located on a public thoroughfare in premises which may be occupied, operated or conducted for business, trade or industry or on an arcade or sub-surface thoroughfare leading to a railroad terminal."

The constitutionality of this section was sustained in *Evers* v. *Dimino*, 186 Misc. 186, 61 N.Y.S. 2d 504 (1946). See also *Lipshitz* v. *T. & D. Wines and Liquors, Inc.*, 190 Misc. 261, 75 N.Y.S. 2d 321 (1947).

Appellee has neved applied for any license to sell or traffic in wines and liquors in the State of New York nor has appellee instituted any action in the state courts to review the opinion of the Attorney General or the action of the Liquor Authority, or to enjoin the application of the Alcoholic Beverage Control Law.

On July 22, 1960, appellee instituted this action in the United States District Court for the Southern District of New York seeking declaratory and injunctive relief against appellants, as members of the State Liquor Authority. The complaint alleges that appellee's operations are authorized by § 311 of the United States Tariff Act of 1930 as amended (19 U.S.C. § 1311) and the regulations thereunder, and asks for a judgment declaring the application of the licensing provisions of the Alcoholic Beverage Control Law to be repugnant to the Commerce Clause, the Export-Import Clause and the Supremacy Clause of the United States Constitution, and for an injunction restraining the State Liquor Authority from applying the state statutes to its business.

Appellee's motion for the impanelling of a three-judge court under 28 U.S.C. §§ 2281, 2284 to hear and determine the controversy was denied by Judge Bicks, who, while retaining jurisdiction of the cause, held that the Federal Courts should abstain from passing upon the constitutional issues raised until there had been an opportunity for a State Court adjudication. 188 F. Supp. 434 (1960).

The appellee appealed to the Court of Appeals for the Second Circuit.[6] Although stating its opinion that the District Court should have convened a three-judge court, the Court of Appeals held that in light of *Stratton* v. *St. Louis*

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[6] During the pendency of the appeal, appellee's renewal of its request in the District Court for a three-judge court was denied by Judge Dimock, but the District Judge issued a temporary injunction restraining appellants from interfering with appellee's business (R. 210-213).

S. W. R. Co., 282 U. S. 10, it was without jurisdiction to take formal corrective action. 289 F. 2d 426.

Thereafter, the appellee again filed a motion in the District Court requesting the impanelling of a three-judge court. The request was again refused upon the ground that the prior rulings made by the other Judges of the District Court had established "the law of this case" and that the Court of Appeals' opinion that a three-judge court should be convened was merely a "dictum". 194 F. Supp. 3. After granting certiorari and a motion for leave to file a petition for a writ of mandamus (368 U. S. 812), this Court ruled that the criteria for the convening of a three-judge court—including the substantiality of the constitutional question raised—were met here, and remanded the cause to the Disttrict Court for the convening of a three-judge court to consider this litigation. 370 U. S. 713.

Upon remand, the three-judge court, after a hearing, entered its opinion (212 F. Supp. 376) concluding that:

> "The case before us does not, therefore, involve reasonable measures aimed at preventing unlawful diversion or use of alcohol beverages within New York. The Liquor Authority does not seek to use the power of New York to regulate or supervise. It seeks to terminate. This it cannot constitutionally do."

By final judgment dated and entered on February 5, 1963,[1] the three-judge District Court declared the application to appellee of the New York Alcoholic Beverage Control Law § 3, subd. 28, § 62, and § 100, subds. 1 and 2, to be repugnant to the Commerce and Supremacy Clauses of the Constitution of the United States, and permanently enjoined appellants from applying and enforcing these sections against appellee and its operations.

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[1] The judgment of the three-judge court is reprinted in the Appendix, *infra* at pages 43-44.

The Questions Presented Are Substantial

A.

The decision of the court below, holding that the application of the liquor licensing provisions of the New York Alcoholic Beverage Control Law to appellee's operations is repugnant to the Commerce and Supremacy Clauses of the Federal Constitution, raises a substantial constitutional question concerning the power of the States to regulate and control the movement and sale of intoxicating liquors within their borders.

Basic to the consideration of this question is § 2 of the Twenty-first Amendment to the Federal Constitution, which declares:

> "The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The interpretation of the Twenty-first Amendment is, of course, a Federal question, and the relationship thereunder of state rights of regulation to federal rights asserted under other provisions of the Constitution may be and has been considered by this and other Federal Courts.

In *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59 (1936), this Court held that under § 2 of the Twenty-first Amendment, the State's power of regulation over traffic in intoxicating liquors could not be limited by the Commerce Clause [Art. 1, § 8, cl. 3] of the United States Constitution. In sustaining the validity of a California statute imposing a license fee for importing beer from other states, Mr. Justice Brandeis stated (p. 62):

> "The [Twenty-first] Amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any state 'in violation of the laws thereof,'

abrogated the right to import free, so far as concerns intoxicating liquors. The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes."

In *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132 (1939), this Court in reaffirming the power of the States to control liquor traffic, declared (p. 138):

> "The Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause. Without doubt a State may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put."

Other attempts to limit the exercise of State power over intoxicating liquors under the Twenty-first Amendment by invoking the Commerce Clause have similarly been rejected by the federal courts. See *Mahoney* v. *Triner Corp.*, 304 U. S. 401 (1938); *Indianapolis Brewing Co.* v. *Liquor Control Commission*, 305 U. S. 391, 394 (1939); *Finch & Co.* v. *McKittrick*, 305 U. S. 395, 398 (1939); *General Sales and Liquor Co.* v. *Becker*, 14 F. Supp. 348 (E. D. Missouri, 1936); *Wylie* v. *State Board of Equalization*, 21 F. Supp. 604 (S. D. California, 1937).

In a recent case, *California* v. *Washington*, 358 U. S. 64 (1958), arising under the original jurisdiction of this Court, California applied for leave to file a complaint seeking to enjoin Washington statutes and regulations which admittedly discriminated against out-of-state produced wines. California contended that the Washington statutes violated the Commerce Clause. The summary fashion in which this Court denied California's motion on

the merits, upon the authority of § 2 of the Twenty-first Amendment, leaves no doubt that the paramount rights of the states to regulate liquor traffic untrammeled by the Commerce Clause is considered by this Court to be settled beyond dispute.

Contrary to this consistent line of federal decisions recognizing the absolute power of the states over intoxicating liquors, the court below adjudged the application of the liquor licensing requirements of the New York Alcoholic Beverage Control Law to appellee's liquor operations to be repugnant to the Commerce Clause of the Federal Constitution. The court's holding is based upon the conclusion that the application of New York's liquor control laws in the instant case was not shown to be reasonably necessary to protect the local public interest in preventing unlawful diversion or use of liquor within the state.

By imposing a subjective test purporting to determine the reasonableness of New York's liquor regulations, the court below has failed to follow the precedents of this Court which have rejected any attempt to have the courts question the reasonableness of state liquor regulations adopted pursuant to the Twenty-first Amendment. See *State Board* v. *Young's Market Co.*, 299 U. S. 59, 62 (1936); *Mahoney* v. *Triner Corp.*, 304 U. S. 401, 403-404 (1938); *Indianapolis Brewing Co.* v. *Liquor Control Com'n.*, 305 U. S. 391, 394 (1939); *Finch* v. *McKittrick*, 305 U. S. 395, 398 (1939); Mr. Justice FRANKFURTER concurring in *Carter* v. *Virginia*, 321 U. S. 131, 139 (1944).

As this Court stated in *Mahoney* v. *Triner Corp.*, 304 U. S., at 404:

> "We are asked to limit the power conferred by the [Twenty-first] Amendment so that only those importations may be forbidden which, in the opinion of the Court, violate a reasonable regulation of the liquor

traffic. To do so would, as stated in the *Young's Market* case, p. 62, 'involve not a construction of the Amendment, but a rewriting of it.' "

The District Court attempted to justify its consideration of the reasonableness of New York's application of its liquor control laws by citing *Duckworth* v. *Arkansas*, 314 U. S. 390 (1941), and *Carter* v. *Virginia*, 321 U. S. 131 (1944). However, the majority opinions in both the *Duckworth* and *Carter* cases were explicitly clear that the state liquor laws at issue could be sustained under the Commerce Clause alone, without the need for any consideration of the powers of the states under the Twenty-first Amendment. Moreover, the *Duckworth* and *Carter* cases involved the application of state laws to the transportation of liquors merely passing through the state as part of a continuous shipment to a consignee in another state. In the instant case, appellee is itself the consignee responsible for the purchase and importation of liquors into New York State (R. 134, 135, 153). The liquors that have been purchased by the appellee remain stored in its private premises for periods of up to 30 days or more (R. 136) until orders for its resale have been received and paid for. At the time the liquors are received at appellee's premises in New York, it is impossible to determine their ultimate destination (R. 111). Clearly, appellee's resale operations can in no sense be treated as if merely involving a continuous shipment of liquor through the State of New York.

The district court further erred in interpreting state power under the Twenty-first Amendment as being applicable only in the state in which *final* delivery of liquor occurs. Such interpretation is certainly not warranted by the language of § 2 of the Twenty-first Amendment. If liquors are transported into the State of New York for delivery and sale to appellee—as is admittedly the case here—it is incomprehensible how New York can be held

to be without jurisdiction to apply its liquor licensing requirements to appellee's operations by reason of appellee's intention subsequently to resell its liquor to airline passengers departing from the State. Nor is the District Court's interpretation supported by prior decisions of this Court. In *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132 (1939), this Court rejected the contention that, despite the Twenty-first Amendment, exports of liquors remain subject to the Commerce Clause and free of state regulation. In *Ziffrin*, appellant, an Indiana trucking corporation, holding a certificate under the Federal Motor Carrier Act to operate as a contract carrier, had been denied a state license by Kentucky to export whiskeys from Kentucky directly to Illinois. Appellant sought to enjoin enforcement of the Kentucky Alcoholic Beverage Control Law as being violative of the federal Commerce Clause. In affirming the dismissal of appellant's complaint, this Court stated (p. 140):

> "[T]he State may decline to consider certain noxious things legitimate articles of commerce, and inhibit their transportation. Property rights in intoxicants depend on state laws and cease if the liquor becomes contraband.
>
> We cannot accept appellant's contention that because whiskey is intended for transportation beyond the state lines the distiller may disregard the inhibitions of the statute by delivery to one not authorized to receive; that the carrier may set at naught inhibitions and transport contraband with impunity."

In *Gordon* v. *Texas*, 355 U. S. 369 (1958), affirming 166 Tex. Cr. R. 24, 310 S. W. 2d 328, this Court recognized state control over intoxicating liquors to the extent of sustaining a Texas excise tax on liquors purchased and imported from Mexico and merely passing through Texas en route for consumption in another state despite appellant's defenses based on the Commerce and Export-Import

Clauses. The application of the Texas statute was sustained in a three-line *per curiam* decision citing the Twenty-first Amendment and also *Carter* v. *Virginia*, 321 U. S. 131.

The District Court reads the *Gordon* decision "as no more than a reaffirmance of the narrow holding in *Carter*". However, since the holding in *Carter* was reached independently of any consideration of the Twenty-first Amendment, the *Gordon* decision must mean that the application of a state's liquor regulations to liquor destined beyond its borders may be sustained as an exercise of the state's police power to prevent illegal liquor traffic within the state—as in *Carter*—or in recognition of the powers of the state under the Twenty-first Amendment.*

B.

Even if a test of reasonableness was proper in determining the constitutionality of state liquor laws under the Twenty-first Amendment, it is submitted that the application of New York's liquor licensing requirements to appellee's operations has not been shown to be precluded thereby. In the light of appellee's acknowledged activities in the purchase, solicitation and receipt of orders and payment for and sale of alcoholic beverages—as described in its complaint (Par. 4)—it is not surprising that appellee's complaint refrains from attacking the obvious, *i.e.*, that its operations are within the literal language of §§ 3, subd. 28, and 100, subd. 1 of the Alcoholic Beverage Control Law requiring an appropriate state license to sell alcoholic

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*It should be noted that even prior to the enactment of the Twenty-first Amendment, this Court held in *Delamater* v. *South Dakota*, 205 U. S. 93, 100 (1907), that the soliciting or taking of orders or proposals to purchase intoxicating liquors may be prohibited, restricted or regulated by a state "wholly irrespective of when or where it was contemplated the proposals would be accepted or whence the liquor which they embraced was to be shipped."

beverages. Nor did appellee, in its complaint or before the court below, contend that any of the liquor licensing requirements of the Alcoholic Beverage Control Law were unreasonable or violative of due process requirements.

The District Court, however, construed their test of reasonableness as being whether the New York laws were necessary to prevent unlawful diversion or use of alcoholic beverages within the state.

The record below clearly discloses that appellee is not subject to any government bond in the conduct of its liquor operations (R. 100) and does not store its liquors in a customs warehouse. There is no customs officer assigned to appellee's premises to witness the entry, storage or removal of liquors (R. 120), nor is any customs officer assigned to witness the asserted delivery of liquors from appellee's premises to a plane (R. 126-128). Despite these facts, the District Court concluded that the availability of appellee's records and inventory to occasional inspections by customs officials rendered the application of New York's licensing laws unnecessary and hence unconstitutional. Apparently, the District Court overlooked this Court's warning in *Duckworth* v. *Arkansas, supra,* that "efforts at effective regulation, state and national, of intoxicating liquor, evidenced by the long course of litigation in this Court, have not left us unaware of the peculiar difficulties of controlling it or of its tendency to get out of legal bounds" (p. 396).

The requirement of an appropriate license to sell and traffic in alcoholic beverages in New York is the key to the state's comprehensive regulatory program designed by the legislature to insure that all traffic in liquors shall be under constant public surveillance and control and conducted in such manner as to minimize its dangers to the community. Before a liquor license may be issued, the New York State Liquor Authority must be satisfied that the public convenience and advantage will be promoted

by its issuance,[9] that the applicant has not been convicted of a felony[10] and that the location of the licensed premises complies with requirements as to its distance from schools, places of worship and other licensed premises[11], and with the requirement of a street-level entrance.[12] In addition, each retail liquor licensee must maintain adequate books and records for inspection by State Liquor Authority representatives.[13] By enjoining the application of New York's liquor licensing requirements, the District Court has granted the appellee *carte blanche* to operate free from all safeguards which the legislature of New York considered as being necessary to protect the public interest.[14]

The court below also operated under the misconception that the possibility of diversion of liquors was the sole concern of New York in appellee's operations. The Court ignored the economic incidents of appellee's operations. In holding New York's licensing regulations to be inapplicable, appellee has been absolved from complying with such requirements as limitations on the hours it may operate,[15] the customers it may deal with,[16] and with the requirement

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[9] New York Alcoholic Beverage Control Law §§ 2, 17, see *Matter of Brenner* v. *O'Connell*, 308 N. Y. 636, 127 N. E. 2d 715 (1955).

[10] New York Alcoholic Beverage Control Law § 110(4).

[11] New York Alcoholic Beverage Control Law § 105, subds. 3, 4.

[12] New York Alcoholic Beverage Control Law § 105, subd. 2. In describing the need for this section, Justice Hofstadter, in *Lipshitz* v. *T. & D. Wine & Liquors, Inc.*, 190 Misc. 261, 75 N.Y.S. 2d 321, stated: "Plainly, the underlying purpose of the statute was to assure proper visibility into a licensed premises so that all of the activity in the conduct of the business would be open and apparent to the general public and to enforcement officials." The location of appellee's premises on the second floor of the Arrivals Building at Idlewild Airport does not satisfy the requirements of this section.

[13] New York Alcoholic Beverage Control Law § 105, subd. 15.

[14] It is evident from the district court's final judgment (R. 272-273) and rejection of appellant's counter-proposed final judgment—reprinted in the Appendix, *infra* at pp. 45-47, that appellee has been absolved from all state liquor regulations.

[15] New York Alcoholic Control Law § 105, subd. 14.

[16] New York Alcoholic Control Law § 65.

of adhering to New York's minimum consumer resale prices.[17] Regardless of the ultimate destination of its liquors, appellee's freedom to sell independently of these limitations and without payment of license fees and taxes provides it with an enormous economic advantage over retail licensees within the State. Such competitive advantage is inimical to the just and orderly enforcement of New York's liquor control laws and threatens to invite a flood of similar un-licensed liquor operations throughout the State.

C.

The district court further erred in declaring that the application of New York's liquor licensing requirements to appellee's operations was in conflict with § 311 of the Tariff Act of 1930 as amended (19 U.S.C. § 1311) and, therefore, repugnant to the Supremacy Clause of the Federal Constitution.

Section 311 provides a procedure by which domestic manufacturers of articles manufactured in class 6 bonded warehouses may export such articles free from customs duties. The obvious intent of this section was to relieve domestic manufacturers of Customs duties either upon *direct* exportation of their manufactured articles from the bonded warehouses where made, or, when necessary, to arrange for additional transportation facilities at exterior ports, in which event such articles may be "withdrawn under such regulations as the Secretary of Treasury may prescribe for transportation and delivery into any bonded warehouse at an exterior port for the *sole purpose of immediate export therefrom.*" (Emphasis supplied.)

The regulations adopted under the authority of § 311 and permitting warehouse withdrawals for transportation and exportation were enacted solely to permit manufacturers to meet transportation obstacles which might pre-

[17] New York Alcoholic Control Law § 101-c(5).

vent the exportation of their articles in one direct shipment. Thus, § 18.19(b)(3) of Title 19 C. F. R. provides:

> "If any part of a shipment is not exported or when a shipment is divided at the port of exportation, extracts in duplicate from the manifest on file in the customhouse shall be made on customs Form 7512 for each part, one copy to be sent to the discharging inspector and the other to the landing inspector to be used as a report of exportation. *The splitting up for exportation of shipments arriving under warehouse withdrawals for transportation and exportation shall be permitted only when various portions of a shipment are destined to different destinations, when the export vessel cannot properly accommodate the entire quantity, or in other similar circumstances.* * * *" (Emphasis supplied.)

Appellee, although claiming to operate under § 311, neither manufactures intoxicating liquors (R. 131) nor stores them in Class 6 bonded manufacturing warehouses. Nor is appellee a mere conduit in the direct exportation of such liquors. Appellee purchases its liquors from out-of-state wholesalers and retains full title until it *resells* them to customers at its premises at Idlewild Airport. Indeed, as we have noted, liquors may be stored in appellee's private premises for indefinite periods (in some cases for thirty days or more, by appellee's own admission—R. 135-136) until they have been resold to individual airline passengers. This type of resale operation, we submit, was never intended to come within the scope and coverage of § 311, as its language unquestionably indicates.

Even if we assume, contrary to the evidence, that appellee's operations are within the meaning of § 311, it cannot be shown how this would in any manner restrict or preclude the states from regulating or licensing sales and traffic in intoxicating liquors within their borders. Certainly, no language which would support the right of cus-

toms officers to prevent state control over intoxicating liquors can be found in § 311, or in any other federal statute or regulation. On the contrary, numerous federal statutes specifically recognize the rights of the States to regulate and license traffic in intoxicating liquors regardless of the effect on interstate or foreign commerce.

As early as 1890, Congress, by enactment of the "Wilson Act" (26 Stat. 313, now found in 27 U.S.C. § 121), provided that:

> "All fermented, distilled, or other intoxicating liquors or liquids *transported into any State* or Territory or remaining therein *for use*, consumption, *sale or storage* therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." (Emphasis supplied.)

The "Webb-Kenyon Act" (37 Stat. 699, Act of Mar. 1, 1913, re-enacted by Act of Aug. 27, 1935, 49 Stat. 877, and presently found in 27 U.S.C. § 122) further prohibits shipment or transportation of intoxicating liquors to any state "to be received, possessed, sold, or in any manner used" in violation of the law of such state regardless of its interstate or foreign source.

Of particular significance is the "Federal Alcohol Administration Act" (Act of August 29, 1935, c. 814, 49 Stat. 977, presently found in Chapter 8 of Title 27 of the United States Code), which imposes as a requirement for engaging in the business of importing, distilling, rectifying, warehousing, or "purchasing for resale at wholesale" distilled spirits, wines or malt beverages, the receipt of a basic permit from the Secretary of the Treasury. The

issuance of a basic permit is conditioned upon compliance "with the Twenty-first Amendment and laws relating to the enforcement thereof" (27 U.S.C. § 204 [d]) and shall be denied by the Secretary of the Treasury upon finding "that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted" (27 U.S.C. § 204[a][2][C]).

In the light of these Acts of Congress revealing a historic fededal policy of protecting the exercise of the police powers of the states in their control of intoxicating liquors, regardless of their effect on interstate or foreign commerce, the argument for federal pre-emption by reason of the asserted application of § 311 is clearly without merit.

Since the effective date of the Twenty-first Amendment (on December 5, 1933—three years after the enactment of the Tariff Act of 1930), federal power over intoxicating liquors has been subordinate to the authority of the states to control all liquor traffic within their borders. The Federal Government retains the right to exercise its acknowledged jurisdiction in the field of interstate and foreign commerce, but when such jurisdiction affects traffic in intoxicating liquors it must be supplemental or subordinate, and not hostile, to that part of the state's power as is constitutionally rendered invulnerable and absolute under the Twenty-first Amendment. Thus, even where as encompassing a federal statute as the Sherman Anti-Trust Act has been applied to transactions involving intoxicating liquors, the federal courts have taken care to insure that the application of the federal statute did not tend to interfere with the enforcement of state liquor control laws. See, *e.g.*, *U. S.* v. *Frankfort Distillers*, 324 U. S. 293 (1945); *Washington Brewers Institute* v. *United States*, 137 F. 2d 964 (9 Circ., 1943), cert. den. 320 U. S. 776. As Mr. Justice FRANKFURTER, in his concurring opinion in *U. S.* v. *Frankfort Distillers*, *supra*, stated (pp. 300-301):

> "Since the Commerce Clause is subordinate to the exercise of state power under the Twenty-first Amend-

ment, the Sherman Law, deriving its authority from the Commerce Clause, can have no greater potency than the Commerce Clause itself. It must equally yield to state power drawn from the Twenty-first Amendment."

The District Court's assertion, that Customs controls under the purported authority of § 311 of the Federal Tariff Act render the licensing requirements of the New York Alcoholic Beverage Control Law a nullity, is a definite assertion of hostility to and denial of state authority under the Twenty-first Amendment and cannot be sustained.

CONCLUSION

For the reasons stated above, it is submitted that the decision below is in conflict with prior decisions of this Court and raises questions of substantial public importance concerning the powers of the states to regulate traffic in intoxicating liquors within their borders pursuant to the Twenty-first Amendment to the Constitution of the United States. It is submitted that the Court has jurisdiction and that this appeal should be heard.

Dated: New York, N. Y., May 3, 1963.

Respectfully submitted,

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APPENDIX

Opinion of the Three-Judge Statutory Court.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 CIV. 2902

IDLEWILD BON-VOYAGE LIQUOR CORP.,

Plaintiff,

v.

MARTIN C. EPSTEIN, *et al.*,

Defendants.

(Argued October 5, 1962
Decided December 27, 1962)

Charles H. Tuttle, of New York, N. Y.; Kelly & Schwartz, of New York, N. Y., attorneys (John F. Kelly, Esq., of counsel) *for plaintiff*.

Irving Galt, Assistant Solicitor General of the State of New York (Louis J. Lefkowitz, Attorney General of the State of New York, George D. Zuckerman, Deputy Assistant Attorney General of the State of New York on the brief) *for defendants*.

Before Hays, Circuit Judge, Dawson and Bonsal, District Judges.

Action under the Commerce, Export-Import and Supremacy clauses of the Constitution of the United States and Section 311 of the Tariff Act of 1930, 19 U.S.C. § 1311, to enjoin the New York State Liquor Authority from enforcing the New York Alcoholic Beverage Control Law §§ 3 (28), 62 and 100 with respect to plaintiff.

Judgment for plaintiff.

Hays, Circuit Judge.

Plaintiff is a New York corporation engaged in the business of selling tax-free bottled wines and liquors for export to departing passengers at New York International Airport. Upon advice of the Attorney General of the State of New York, the New York State Liquor Authority, the members of which are defendants herein, informed plaintiff that its business was illegal as unlicensed and unlicensable under the provisions of the New York Alcoholic Beverage Control Law. Thereupon plaintiff instituted this action to enjoin the Liquor Authority from interfering with its business. The complaint seeks a judgment declaring the state statute, as applied, repugnant to the Commerce, Export-Import, and Supremacy clauses of the United States Constitution, and Section 311 of the Tariff Act of 1930, 19 U.S.C. § 1311.

Plaintiff's original motion for the impanelling of a three judge court to consider these claims was denied. The judge to whom the application was made ruled that the case was a proper one for application of the doctrine of "equitable abstention", see *Harrison* v. *NAACP*, 360 U. S. 167 (1959), and retained jurisdiction while referring the cause to the state courts for determination of the issues presented. 188 F. Supp. 434. An appeal to the Court of Appeals for the Second Circuit was dismissed on jurisdic-

tional grounds, one judge dissenting. 289 F. 2d 426. While unambiguously stating the view of all the judges on the panel that the district court had acted erroneously, and that a "three judge district court should have been convened" to pass upon, *inter alia,* the abstention issue, *id.* at 430, the majority felt constrained to dismiss the appeal under the rule of *Stratton* v. *St. Louis, S. W. Ry.*, 282 U. S. 10 (1930). The Supreme Court granted certiorari[1] and remanded the cause. Agreeing with the Court of Appeals that a three judge court should have been convened[2] the Court ruled that the Court of Appeals was not without power to correct a single judge who erroneously invaded the province of a three judge court, and remanded the cause to the district court for the convening of a three judge court "to consider this litigation." 370 U. S. 713 (1962). This court was convened pursuant to that order.

Plaintiff's place of business is located on the second floor of the Arrivals Building[3] at Idlewild Airport[4] in

[1] 368 U. S. 812. The Court also granted a motion for leave to file a petition for a writ of mandamus to the district court. Formal action on the petition was deemed unnecessary. 370 U. S. 713, 716.

[2] "We agree with the Court of Appeals that a three-judge court should have been convened in this case. When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute. Those criteria were assuredly met here, and the applicable jurisdictional statute therefore made it impermissible for a single judge to decide the merits of the case, either by granting or by withholding relief." 370 U. S. at 715.

[3] Orders are also taken at two small areas in other buildings at the airport and phoned to the main office in the arrivals building.

[4] The Port of New York Authority leases the land on which Idlewild Airport was built from the City of New York. Unlike the situation arising when land is ceded by a state to the federal government for military or other purposes, the compact between New York and New Jersey creating the Port Authority did not alter the territorial boundaries nor substantially affect the jurisdiction of either state. See N. Y. Unconsol. Laws §§ 6421, 6836 (McKinney 1961).

space rented from the Port of New York Authority under a lease by the terms of which the demised premises may be used only as "an office in connection with the sale • • • of in-bond wines and liquors". The building plans for these premises and the premises themselves were inspected and approved by United States Customs Officials at Idlewild.

Operating from these premises, plaintiff receives orders and payment from passengers departing by plane for foreign countries. Sales are made only to passengers who present tickets and boarding cards indicating their imminent departure. While payment is made at the time of sale, the passenger is given only a receipt. The merchandise is delivered aboard the departing aircraft on documents approved by United States Customs, with instructions to the air line to deliver to the passenger purchaser only upon arrival at the foreign destination. This procedure was approved in 1958 by the Bureau of Customs of the United States Treasury Department, by letter of the Acting Commissioner of Customs to the New York Collector of Customs.

Plaintiff purchases the beverages it sells from several bonded wholesalers located outside the State of New York, who deal in tax free liquors for export. Upon receipt of an order from plaintiff, the merchandise is withdrawn from a bonded warehouse on Customs Form 7512, and shipped via bonded trucker to plaintiff's premises at Idlewild. One copy of the form is mailed by the wholesaler to the United States Customs Office at Idlewild, a second copy is mailed to plaintiff, a third sealed copy accompanies the shipment, and is delivered to Customs upon arrival at Idlewild. The contents of the order are received and counted by plaintiff, and entered in its records. The liquor is then stored at plaintiff's premises until resold to foreign-

bound passengers, at which time a withdrawal from inventory is noted in the records. When the entire order has been resold, the records are submitted to the customs inspector at Idlewild.

Plaintiff's books, records and inventory are open to inspection by customs officials at any time, and such inspections do in fact take place. The Bureau of Customs is free to supervise the unloading of the merchandise from the bonded trucks and its transportation to plaintiff's premises as well as its delivery by plaintiff to departing aircraft, and has in fact done so "numerous times".

The plaintiff's sales amount to several hundred bottles a day, the largest sales for a single day being 735.

Upon advice of the Attorney General of the State of New York, the Liquor Authority informed plaintiff, in July 1960, that its operation was illegal under the provisions of the New York Alcoholic Beverage Control Law. The Attorney General was of the opinion that plaintiff was engaged in "selling" alcoholic beverages within the meaning of § 3 [28] of that Act,[5] that a license was therefore required under § 100 [1],[6] but that plaintiff was not licensable, citing Rule 17 of the Rules of the State Liquor Authority, limiting the number of licenses issued in each

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[5] "'Sale' means any transfer, exchange or barter in any manner or by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and/or a warehouse receipt pertaining thereto. 'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state." N. Y. Alcoholic Beverage Control Law § 3 [28].

[6] "No person shall * * * sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter." Section 100 [1] of the N. Y. Alcoholic Beverage Control Law.

county, and § 105 (2) of the Act.[7] In response of this opinion, the New York Importers and Distillers Association circularized its members advising them that under § 62 of the Alcoholic Beverage Control Law, they could not legally fill plaintiff's orders. The Liquor Authority notified at least one of the truckers delivering merchandise to plaintiff that the trucker was assisting in violations of the law. The trucker thereafter refused to make deliveries. Thus plaintiff is clearly threatened with irreparable injury, since it will be put out of business by the Liquor Authority unless it is successful in this action.

An examination of the New York Alcoholic Beverage Control Law as a whole suggests a considerable doubt as to its applicability to plaintiff's operations. The definition of sale in Section 3, (28) provides that "To sell • • • shall include the delivery of any alcoholic beverage in the state." This, of course, is inapplicable to plaintiff's sales. Whatever may be the purpose of Section 105 (2) in requiring that a retail liquor store have an entrance from the street level and be located on a public thoroughfare, the requirements, which may be appropriate where liquor purchases are delivered directly to the customer, seem quite irrelevant to a concern which sells liquor exclusively for delivery in a foreign country.

It is entirely probable that the legislature in adopting a statute governing the sale of liquor in New York State did not have within its contemplation the establishment of such a business as plaintiff conducts. The declaration of policy contained in Section 2 of the Alcoholic Beverage

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[7] "No premises shall be licensed to sell liquors and/or wines at retail for off premises consumption, unless said premises shall be located in a store, the entrance to which shall be from the street level and located on a public thoroughfare in premises which may be occupied, operated or conducted for business, trade or industry or on an arcade or sub-surface thoroughfare leading to a railroad terminal." Alcoholic Beverage Control Law § 105 [2].

Control Law refers to sale and distribution "within the state" and states that: "The restrictions, regulations and provisions contained in this chapter are enacted by the legislature for the protection, health, welfare and safety of the people of the state." The declared "purpose of fostering and promoting temperance" would appear to be approriate to the consumption of liquor in New York rather than in various foreign countries.

It also seems to us to be reasonably certain that the courts of the State of New York would reject as unlawful the attempt of the State Liquor Authority to terminate plaintiff's business. In *During* v. *Valente*, 267 App. Div. 383, 46 N. Y. S. 2d 385 (1944), the court held that the provisions of the Alcoholic Beverage Control Law were inapplicable to the sale of liquor located in the Free Trade Zone of the Port of New York. The court said at 46 N. Y. S. 2d 387:

> "Counsel for New York State Liquor Authority argues that the provisions of the Alcoholic Beverage Control Law apply to goods within the trade zone because by the creation of the trade zone no cession of any territory was made to the Federal Government. It is asserted that in the absence of any cession the land is a part of the State of New York and subject to its laws.
>
> The fact that this trade zone is within the geographical limits of the State of New York is not controlling. This Court had occasion to consider the status of goods under control of the Federal Government for the purpose of re-export in Gulf Oil Corp. v. McGoldrick, 256 App. Div. 207, 9 N. Y. S. 2d 544, affirmed 281 N. Y. 647, 22 N. E. 2d 480, affirmed with opinion 309 U. S. 414, 60 S. Ct. 664, 84 L.Ed. 840. It was there held that the mere geographical location of the goods within the state of New York did not

constitute an import into the state and that the sale of such goods was not subject to local regulation or tax. This decision seems conclusive of this case.

It is urged, however, that the Twenty-first Amendment to the Federal Constitution puts Portuguese Brandy on a status different from that of crude oil. The amendment in so far as relevant provides that:

'The transportation or importation into any State, Territory, or possession of the United States *for delivery or use therein* of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.' (Italics our own.)

By its terms the Amendment grants power to a state to regulate traffic in liquor only to the extent that such liquor is transported or imported for delivery or use within such state. The complaint contains no allegation from which it could be inferred that the sale involved the importation of the liquor into the State of New York within the meaning of the amendment."

See also *Gulf Oil Corp* v. *McGoldrick*, 256 App. Div. 207, 9 N. Y. S. 2d 544, affirmed, 281 N. Y. 647, 22 N. E. 2d 480, (1939), affirmed 309 U. S. 414 (1940); *Rosenblum* v. *Frankel*, 279 App. Div. 66, 108 N. Y. S. 2d 6 (1951), where the court cited *During* v. *Valente* for the statement that:

> "the regulatory powers of the State Liquor Authority [do not] extend to international transactions, even in alcoholic beverages, except sales for domestic consumption in New York," 108 N. Y. S. 2d at 9.

The probability that the New York courts would decide either that the Alcoholic Beverage Control Law was inapplicable to plaintiff's business, or that its application would be an unconstitutional interference with the power of Congress over foreign commerce (see cases *supra*) would lead

us, under a technical application of the doctrine of abstention, to leave the determination of these issues to the state courts. Under the peculiar circumstances of the present case we think that those conclusions argue for the opposite result, and that we should decide the constitutional issue which has been presented.

We do not think that we should send this operator of a small business trudging into the New York courts to undertake, after more than two and a half years already spent in litigation, many more months of court procedures, especially when it appears to us to be a foregone conclusion that, after carrying the case to the New York Court of Appeals, or, if need be, to the United States Supreme Court, he will certainly obtain the relief he now seeks. To do so would constitute a mechanical application of the doctrine of constitutional abstention in complete disregard of the reasons for the existence of that doctrine and of the equitable aspects of the instant case.

The doctrine of abstention is equitable in origin[*], and we should balance the injustice of subjecting plaintiff to additional expense and delay against the advantages which may accrue from adherence to the traditional policy of avoiding constitutional adjudication. In doing so we should remember that the procedure of the three judge court with direct appeal to the Supreme Court, was established for the determination of these issues at least partly because of the need for speedy resolution of the controversies. In the present case the Supreme Court remanded "for expeditious action".

That expense and delay and the probability of the result should be given equitable weight is indicated by *City of Chicago* v. *Atchison, T. & S. F. Ry.*, 357 U. S. 77 (1958), where the majority of the court rejected the dissenting

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[*] See *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, 500-501 (1941).

view which would have required application to state authorities. The Court said:

> "Remission to [the state] courts would involve substantial delay and expense, and the chance of a result different from that reached below, on the issue of applicability, would appear to be slight." P. 84.

See also *Allegheny County* v. *Frank Mashuda Co.*, 360 U. S. 185 (1959):

> "The undesirability of a refusal to exercise jurisdiction in the absence of exceptional circumstances which clearly justify an abstention is demonstrated by the facts of this case. Respondents have consumed considerable time and expense in pursuing their claim that their property has been unlawfully taken. To order them out of the federal court would accomplish nothing except to require still another lawsuit, with added delay and expense for all parties. This would be a particular hardship for the respondents, who, besides incurring the added expense, would also suffer a further prolonged unlawful denial of the possession of their property if ultimately they prevail against the County and its lessee. It exacts a severe penalty from citizens for their attempt to exercise rights of access to the federal courts granted them by Congress to deny them 'that promptness of decision which in all judicial actions is one of the elements of justice.' *Forsyth* v. *Hammond*, 166 U. S. 506, 513." pp. 196-97.

And see *Public Utilities Comm'n* v. *United Fuel Gas Co.*, 317 U. S. 456 (1943):

> "Where the disposition of a doubtful question of local law might terminate the entire controversy and thus make it unnecessary to decide *a substantial constitutional question*, considerations of equity justify a rule of abstention. But where, as here, no state court

> ruling on local law could settle the federal questions that necessarily remain, and where, as here, the litigation has already been in the federal courts an inordinately long time, considerations of equity require that the litigation be brought to an end as quickly as possible." p. 463. (Emphasis supplied).

In the present case both parties urge that we should not abstain. They seek to avoid the "substantial delay and expense" that would result from submission of the issue to the state courts.[9] Counsel for the State of New York has stipulated that:

> "the state will not press its defense of equitable abstention, but in its anxiety to have the matter disposed of at the earliest possible moment, will proceed for full submission to this court.
>
> We feel that the operations of this plaintiff have gone unchecked for two and a half years, and we would like, if possible, to submit this for the earliest possible disposition of the case on the merits."

In addition to these considerations, the constitutional issue which we decide is one of extremely narrow compass. The case is quite unlike *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941) where the Court said:

> "The complaint of the Pullman porters undoubtedly tendered a substantial constitutional issue. It is more than substantial. It touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." p. 498.

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[9] The reference by the Supreme Court in the prior appeal in this case to the fact that the district court originally abstained "although there was no relevant litigation then pending in the state courts", 370 U. S. at 714, lends some credence to plaintiff's contention that the Court intended us to reach the merits in this determination.

Our decision will not interfere with New York's administration of its liquor control laws except in the one particular of prohibiting the continuation of this plaintiff's business. We do not even decide that New York cannot regulate and supervise the operation of plaintiff's business in the interest of those considerations which are the basis of its Alcoholic Beverage Control Law.

Not only will our decision have no widespread implications for the enforcement of New York's laws with respect to sale of liquor, it will have no important repercussions in the conduct of that business generally. Plaintiff's operation is a small one. We are not made aware that there is any other like it in New York or elsewhere. If others exist apparently no effort has been made to eliminate them. Moreover the very nature of the business allows for only a few such enterprises and an operation very limited in size and scope. The fact is that whether or not plaintiff is permitted to continue its business is apparently of very little moment to anyone except plaintiff itself.

Under these circumstances to abstain from deciding the issue before us would be to reduce the doctrine of abstention to the status of a meaningless formality.

We turn then to the constitutional issue involved in plaintiff's contention that the application to its business of the New York Alcoholic Beverage Control Law in the manner threatened is repugnant to the Commerce Clause of the United States Constitution. There is no doubt that the threatened application would be constitutionally invalid if the case involved legitimate articles of commmerce other than alcoholic beverages.[10] The Liquor Authority contends, however, that the attempted regulation is a valid exercise of the state police power over alcoholic beverages,

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[10] See, *e.g.*, *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50 (1922) (grain); *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229 (1911) (gas). Cf. *H. P. Hood & Sons* v. *Du Mond*, 336 U. S. 525 (1949) (milk).

and as such, is not an undue burden on commerce; or alternatively, that it is valid by reason of the Twenty-first Amendment to the Constitution of the United States. We do not agree.

It has long been settled that commerce in alcoholic beverages is not beyond the scope of protection of the Commerce Clause, *Leisy* v. *Hardin*, 135 U. S. 100 (1890); *Bowman* v. *Chicago & N. Ry.*, 125 U. S. 465 (1888), and that unreasonable burdens on such commerce must fall unless validated by the Twenty-first Amendment. See *State Board of Equalization* v. *Youngs Market*, 299 U. S. 59, 62 (1936) (dictum). Because of the potentially injurious effects of intoxicating liquor, "the peculiar difficulties of controlling it • • • [and] its tendency to get out of legal bounds", commerce in alcoholic beverages may be subjected to more extensive local regulation than commerce in less injurious products. *Duckworth* v. *Arkansas*, 314 U. S. 390, 396 (1941). But the regulation must nevertheless be "reasonably necessary to protect the local public interest in preventing unlawful distribution or use of liquor within the state". *Ibid.*

In the *Duckworth* case appellant, a trucker, was convicted of transporting intoxicating liquor through the state without first having obtained the required Arkansas permit. The permit was required as "a means of establishing the identity of those who are to engage in the transportation, their route and point of destination, and [to] afford • • • opportunity for local officials to take appropriate measures to insure that the liquor is transported without diversion, in conformity to the permit." *Ibid.* It was available to qualified carriers for a nominal fee. In upholding the validity of the permit requirement the Court stated:

> "Where the power to regulate commerce for local protection exists, the states may adopt effective measures to accomplish the permitted end. The Arkansas

> statute does not conflict with any act of Congress. It does not forbid or preclude the transportation, or interfere with the free flow of commerce among the states beyond what is reasonably necessary to protect the local public interest in preventing unlawful distribution or use of liquor within the state. It does not violate the commerce clause. *Cf. Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132." 314 U. S. at 396.

The action threatened against plaintiff is his elimination from the business in which he engages. It is not applied with the purpose of "preventing unlawful distribution or use of liquor within the state." It appears that regardless of any measures taken by plaintiff to insure against diversion of its products into New York or to render its operations open to inspection or control by state officials, the required license will not be made available. New York no doubt has power to regulate plaintiff's operation for local protection. The action proposed is not directed to that end.[11]

It is argued, however, that no requirement of reasonableness is imposed under the Twenty-first Amendment.

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[11] This also disposes of defendant's argument that the regulation is authorized by the Wilson Act, 27 U. S. C. 121, or by the Webb-Kenyon Act, 27 U. S. C. 122, which were designed to preclude further application of the "original package doctrine" to commerce in intoxicating liquors. We do not read these statutes to authorize any and all kinds of local regulation of interstate or foreign commerce in alcoholic beverages, but only such regulation as is reasonably related to the protection of valid local interests.

Even if these statutes were to be accorded a broader meaning, it must be recalled that plaintiff's operations are conducted pursuant to the tax free export program established by § 311 of the Tariff Act of 1930, 19 U. S. C. 1311. While there is no reason to suppose that Congress intended to preempt any and all state regulation applicable to exports under § 311, it must at least have intended to appeal *pro tanto* any existing legislation which would authorize state regulation totally nullifying the program.

In terms, the amendment refers only to "transportation or importation *into* any State * * * for delivery or use therein of intoxicating liquors, in violation of the laws thereof * * *" [emphasis supplied].[12] It is well settled that the states may control importation of intoxicating liquors into their territories without regard to the Commerce Clause.[13] But we are not here concerned with shipments into New York for "delivery or use therein". While the liquor sold by plaintiff passes through New York state and payment for it is made there, it is neither finally delivered nor used until the passenger purchaser arrives at his foreign destination.

In *Collins* v. *Yosemite Park*, 304 U. S. 518 (1938), the park authority sued to enjoin enforcement of the California Beverage Control Law within the park, and its application to beverages sought to be shipped into the park from other states. The Court ruled that cession of the park to the federal government had completely divested California of power to regulate liquor traffic within its confines, and that the California licensing provisions were accordingly invalid as applied. Application of these provisions prior to arrival of the liquor within the confines of the park was also held invalid. In rejecting the argument that the Twenty-first Amendment authorized the regulation under attack, the Court said:

> "The lower court was of the opinion that though the Amendment may have increased 'the state's power to deal with the problem * * *, it did not increase its

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[12] "The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited." Constitution of the United States, Amendment XXI, § 2.

[13] See *Finch & Co.* v. *McKittrick*, 305 U. S. 395 (1939); *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401 (1938); *State Board of Equalization* v. *Youngs Market*, 299 U. S. 59 (1936).

> jurisdiction.' With this conclusion, we agree. As territorial jurisdiction over the Park was in the United States, the State could not legislate for the area merely on account of the XXI Amendment. There was no transportation into California 'for delivery or use therein'. The delivery and use is in the Park, and under a distinct sovereignty." 304 U. S. at 538 (footnotes omitted).[14]

This analysis is clearly applicable here. "Delivery or use" of the liquors sold by plaintiff is not in New York but in some foreign country, obviously beyond the reach of the laws of New York. Plaintiff's products merely pass through New York on their way to their foreign destinations. The state cannot completely halt such passage.

Defendants would have us read the *Collins* case more narrowly to apply only where liquor is en route to a federal reservation. In answer suffice it to say that the Supreme Court has not done so. In *Carter* v. *Virginia*, 321 U. S. 131 (1944), the Court cited the *Collins* case for the proposition that "shipment through a state is not transportation or importation into the state within the meaning of the [twenty-first] Amendment" (at 137).[15]

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[14] *Accord, Johnson* v. *Yellow Cab Transit Co.*, 137 F. 2d 274 (10th Cir. 1943), *affirmed*, 321 U. S. 383 (1944).

[15] See also *Nippert* v. *City of Richmond*, 327 U. S. 416, 425 n. 15:

> "Thus, even the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate when the State's regulation squarely conflicts with regulation imposed by Congress governing interstate trade or traffic, *United States* v. *Frankfort Distilleries*, 324 U. S. 293, whether or not also in some instances in addition to complete exclusion from passing through the State, *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, in the absence of such congressional action. Cf. *Carter* v. *Virginia*, 321 U. S. 131, 137; *Ziffrin* v. *Reeves*, 308 U. S. 132, 140."

It is argued, however, that although *final* delivery of the liquors sold by plaintiff does not take place in New York, there is nevertheless a delivery from the wholesaler to the plaintiff which renders the Twenty-first Amendment applicable and *Collins* inapplicable. But the state has no interest in the delivery as such. "Delivery" as well as "use" is subject to state regulation because of the possibility that the liquor may be diverted from its intended destination and consumed instead in the state in which it is delivered. The cases relied upon by the defendants establish no more than the power of the states through which liquor passes or in which it is delivered for redelivery elsewhere to enact legislation to guard against such diversion.

Defendants place particular reliance on *Ziffrin, Inc.* v. *Reeves,* 308 U. S. 132 (1939) in which appellant, an Indiana trucking corporation holding a certificate under the Federal Motor Carrier Act, sought to enjoin application of the Kentucky Liquor Control Law to its activities while operating as a contract carrier transporting whiskey from Kentucky directly to Illinois. The Act required carriers of alcoholic beverages to hold a transport license, which license was available only to persons holding a State Common carrier's certificate. Plaintiff had been denied such a certificate. In affirming the denial of relief below, the Court used language that was extremely broad.

Subsequent decisions have clearly retreated from the broad language in *Ziffrin* and have recognized that the result there reached could not be justified in the absence of reasonable state concern over the possibility of diversion of through liquor shipments to local users.[16] Two years

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[16] The thrust of the dicta in *Ziffrin* is that the Twenty-first Amendment completely removed alcoholic beverages from the scope of application of the commerce clause. This view would not only render state regulation valid but federal regulation invalid. However

(Footnote continued on following page)

after the decision in *Ziffrin*, the court in *Duckworth* v. *Arkansas, supra*, expressly refused to base its decision on the Twenty-first Amendment (although, as pointed out by Justice Jackson, concurring, 314 U. S. at 397, it could well have done so). And the decision in *Carter* v. *Virginia*, 321 U. S. 131 (1944), was rested on an even narrower ground. The state regulations there challenged required that carriers of intoxicating liquors through the state in interstate commerce (1) use the most direct route and carry a bill of lading describing the route and (2) post a $1,000 bond conditioned on lawful transportation, and that (3) the true consignee be named in the bill of lading and be one who had a legal right to receive the shipment at destination. Appellants were seeking to run liquor across Virginia into North Carolina in violation of the laws of the latter state when they were apprehended in Virginia. In upholding the convictions under the Virginia statute, the court recognized that state's valid concern with the possibility of diversion to local users, but placed its decision on still narrower grounds, saying:

> "It is enough that Virginia could conclude, in the absence of contrary federal legislation, that she could not safely permit the transportation of liquor through her territory by those who concededly mean to break federal laws and the laws of a neighboring state." 321 U. S. at 137-38.

(Footnote continued from preceding page)

this extreme position has been consistently rejected. See *United States* v. *Frankfort Distilleries*, 324 U. S. 293 (1945) (Sherman Act); *Washington Brewers Institute* v. *United States*, 137 F. 2d 964 (9th Cir. 1943) (same); *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171 (1939) (*Federal Alcohol Administration Act*); *Arrow Distilleries, Inc.* v. *Alexander*, 109 F. 2d 397 (7th Cir. 1940) (same). See also *Dowling Bros. Distilling Co.* v. *United States*, 153 F. 2d 353 (6th Cir. 1946) (upholding federal price regulations under war powers); *Taub* v. *Bowles*, 149 F. 2d 817 (U. S. Emergency Ct. App. 1945) (same).

The most recent Supreme Court decision on the point is *Gordon* v. *Texas*, 355 U. S. 369 (1958), in which the facts closely resembled those in *Carter*. The defendant Gordon had entered Texas from Mexico and was en route to his home in North Carolina with over two gallons of Mexican rum in his possession when the Texas authorities demanded payment of a state tax due on the rum. The tax was payable only by persons not holding a state permit to import intoxicating liquors or to transport them through the state.[17] Gordon had neither obtained nor applied for a permit,[18] and his importation of the rum into his home state of North Carolina would apparently have violated the laws of that state.[19] Defendant's conviction for possession of illicit beverages—i.e. beverages on which a tax was payable and unpaid—was affirmed by the Supreme Court in a three line per curiam decision citing the Twenty-first Amendment and *Carter* v. *Virginia*.

We read the *Gordon* decision as no more than a reaffirmance of the narrow holding in *Carter*, *supra*. At most, *Gordon* v. *Texas* can be read to authorize application of state licensing provisions to through traffic in alcoholic beverages when there is a substantial possibility of diversion or use of the liquor within the state and the state regulation as applied serves to check such diversion or use.

It is possible that there are some types of operations in the course of dealing in liquor which would present such

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[17] See Brief for Appellee, pp. 8-11, *Gordon* v. *Texas*, 355 U. S. 369 (1958).

[18] He was therefore without standing to challenge the Texas statute on the ground that he probably could not have obtained a permit to transport liquor across the state by private automobile. See 2 Vernons Tex. Stat. arts. 666-4 (a), 666-15 (12) (1948).

[19] See N. C. Gen. Stat. § 18-58 (Supp. 1961). It is not clear, however, that the Supreme Court was aware of this factor. The Texas brief did not mention it.

danger of diversion of the liquor that ordinary measures of regulation and supervision would not suffice and therefore even transportation through the state could properly be forbidden. Plaintiff's operation is certainly not such a type. From the time the liquor enters the state until its departure, it is constantly subject to supervision and control by officials of the United States Bureau of Customs. Plaintiff's records and inventory are always open to inspection by Customs officials, and such inspections have often taken place. The possibility of theft of liquor from plaintiff's premises, located as they are in the middle of the world's largest international air terminal, is minimal. In fact, the Liquor Authority has neither alleged nor proved the diversion of so much as one bottle of plaintiff's merchandise to users within the state of New York.

The case before us does not, therefore, involve reasonable measures aimed at preventing unlawful diversion or use of alcoholic beverages within New York. The Liquor Authority does not seek to use the power of New York to regulate or supervise. It seeks to terminate. This it cannot constitutionally do.

Settle order on notice.

PAUL R. HAYS
ARCHIE O. DAWSON
DUDLEY B. BONSAL.

Final Judgment of the Court Below.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

60 Civ. 2902

IDLEWILD BON VOYAGE LIQUOR CORPORATION,

Plaintiff,

against

MARTIN C. EPSTEIN, WILLIAM H. MORGAN, ROBERT E. DOYLE, JOHN C. HART and BENJAMIN H. BALCOM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,

Defendants.

This action under the Commerce, Export-Import and Supremacy Clauses of the United States Constitution, and Section 311 of the Tariff Act of 1930 as amended (19 U.S.C., Section 1311), and applicable provisions of the Internal Revenue Code (Title 26 U.S.C.), to enjoin the State Liquor Authority of the State of New York and its members and agents from applying and enforcing the New York Alcoholic Beverage Control Law, Section 3, subdivision 28, Section 62 and Section 100, subdivisions 1 and 2, with respect to plaintiff's business of selling wines and liquors to airline passengers for delivery only outside the United States, having duly come on for trial on October 5, 1962, before the Honorable Paul R. Hays, United States Circuit Judge, and Honorable Archie O. Dawson and Honorable Dudley B. Bonsal, United States District Judges, sitting without a jury as a three-judge district court, convened pursuant to order of this Court dated August 23, 1962; and the allegations and proofs of the parties having been heard and considered; and the Court having

rendered and filed a decision in writing, dated December 27, 1962, granting judgment in favor of the plaintiff and against the defendants, it is hereby

ORDERED, ADJUDGED AND DECREED that, as applied to the plaintiff and its said operations by the defendants, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York, the foregoing Sections of the Alcoholic Beverage Control Law of the State of New York are repugnant to the Commerce and Supremacy Clauses of the Constitution of the United States, and as so applied are unconstitutional; and it is further

ORDERED, ADJUDGED AND DECREED that the State Liquor Authority of the State of New York, its Chairman, Members and Commissioners, and each of them, their officers, agents, servants, employees and attorneys, and all persons acting under or in concert with them, be and they hereby are permanently enjoined and restrained from applying and enforcing or attempting to apply and enforce, directly or indirectly, Section 3, subdivision 28, Section 62 and Section 100, subdivisions 1 and 2, of the Alcoholic Beverage Control Law of the State of New York, against the plaintiff and its said operations.

Dated: February 5, 1963.

PAUL R. HAYS,
U. S. C. J.

ARCHIE O. DAWSON,
U. S. D. J.

DUDLEY B. BONSAL,
U. S. D. J.

Judgment Entered: February 5, 1963.

JAMES E. VALECHE,
Clerk.

Defendants Counter-Proposed Final Judgment.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

60 Civ. 2902

IDLEWILD BON VOYAGE LIQUOR CORPORATION,

Plaintiff,

against

MARTIN C. EPSTEIN, WILLIAM H. MORGAN, ROBERT E. DOYLE, JOHN C. HART and BENJAMIN H. BALCOM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,

Defendants.

This action having been brought under the Commerce, Export-Import and Supremacy Clauses of the United States Constitution and § 311 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1311, for a judgment declaring certain provisions of the New York Alcoholic Beverage Control Law unconstitutional, as applied to plaintiff's business of selling wines and liquors to airline passengers for delivery only outside of the United States, and to enjoin and prohibit their application and enforcement by the New York State Liquor Authority with respect to the conduct of such business by plaintiff; and a hearing having been held on October 5, 1962 before the Honorable Paul R. Hays, United States Circuit Judge, and Honorable Archie O. Dawson and Honorable Dudley B. Bonsal, United States District Judges, sitting as a three-judge district court, and the Court after due deliberation having ren-

dered and filed a written decision dated December 27, 1962 granting judgment in favor of the plaintiff and against the defendants, it is

ORDERED, ADJUDGED AND DECREED that:

1. The application to plaintiff's business of § 3, subdivision 28 and § 100, subdivision 1 as presently set forth in the Alcoholic Beverage Control Law of the State of New York, is declared to be repugnant to the Commerce, Export-Import and Supremacy Clauses of the Constitution of the United States and to § 311 of the Tariff Act of 1930 as amended, so long as and provided plaintiff engages and continues to engage exclusively in the business at New York International Airport of selling tax-free wines and liquors to departing airline passengers to be delivered to them only upon arrival at their foreign destination; and provided further that all liquors so sold or held by plaintiff for sale shall have been withdrawn from United States Government bonded warehouses, shipped to plaintiff's premises by bonded truckers and received, stored, sold and released by plaintiff in full compliance with § 311 of the Tariff Act of 1930, as amended, 19 U.S.C., § 1311, all pertinent regulations adopted thereunder, and all applicable rules, regulations and orders of the United States Treasury Department.

2. The State Liquor Authority of the State of New York, its Chairman, Members, Commissioners, officers, agents, servants or employees, be and they hereby are permanently prohibited, enjoined and restrained from applying and enforcing, or attempting to apply and enforce the provisions of § 3, subdivision 28 and § 100, subdivision 1, as presently set forth in the Alcoholic Beverage Control Law of the State of New York, against the plaintiff and

its operations so long as and provided plaintiff conducts and continues to conduct its business in the location and manner and under the conditions set forth above; and provided further that nothing herein shall be construed otherwise to limit the power of the State Liquor Authority of the State of New York, its Chairman, Members, Commissioners, officers, agents, servants or employees, to regulate and supervise the operation of plaintiff's business under and consistent with the purposes and objects of the Alcoholic Beverage Control Law of the State of New York.

Dated: New York, New York, January , 1963.

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Federal and State Statutes.

Section 311 of the United States Tariff Act of 1930, as amended (19 U.S.C. § 1311) provides:

"§ 1311. Bonded manufacturing warehouses

All articles manufactured in whole or in part of imported materials, or of materials subject to internal-revenue tax, and intended for exportation without being charged with duty, and without having an internal-revenue stamp affixed thereto, shall, under such regulations as the Secretary of the Treasury may prescribe, in order to be so manufactured and exported, be made and manufactured in bonded warehouses similar to those known and designated in Treasury Regulations as bonded warehouses, class six: *Provided*, That the manufacturer of such articles shall first give satisfactory bonds for the faithful observance of all the provisions of law and of such regulations as shall be prescribed by the Secretary of the Treasury: *provided further*, That the manufacture of distilled spirits from grain starch, molasses, or sugar, including all dilutions or mixtures of them or either of them, shall not be permitted in such manufacturing warehouses.

Whenever goods manufactured in any bonded warehouse established under the provisions of the preceding paragraph shall be exported directly therefrom or shall be duly laden for transportation and immediate exportation under the supervision of the proper officer who shall be duly designated for that purpose, such goods shall be exempt from duty and from the requirements relating to revenue stamps.

No flour, manufactured in a bonded manufacturing warehouse from wheat imported after ninety days after June 17, 1930, shall be withdrawn from such

warehouse for exportation without payment of a duty on such imported wheat equal to any reduction in duty which by treaty will apply in respect of such flour in the country to which it is to be exported.

Any materials used in the manufacture of such goods, and any packages, coverings, vessels, brands, and labels used in putting up the same may, under the regulations of the Secretary of the Treasury, be conveyed without the payment of revenue tax or duty into any bonded manufacturing warehouse, and imported goods may, under the aforesaid regulations, be transferred without the exaction of duty from any bonded warehouse into any bonded manufacturing warehouse; but this privilege shall not be held to apply to implements, machinery, or apparatus to be used in the construction or repair of any bonded manufacturing warehouse or for the prosecution of the business carried on therein.

Articles or materials received into such bonded manufacturing warehouse or articles manufactured therefrom may be withdrawn or removed therefrom for direct shipment and exportation or for transportation and immediate exportation in bond to foreign countries or to the Philippine Islands under the supervision of the officer duly designated therefor by the collector of the port, who shall certify to such shipment and exportation, or ladening for transportation, as the case may be, describing the articles by their mark or otherwise, the quantity, the date of exportation, and the name of the vessel: *Provided*, that the by-products incident to the processes of manufacture, including waste derived from cleaning rice in bonded warehouses under the Act of March 24, 1874, ch. 65, 18 Stat. 24, in said bonded warehouses may be withdrawn for domestic consumption on the payment of

duty equal to the duty which would be assessed and collected by law if such waste or by-products were imported from a foreign country: *Provided*, That all waste material may be destroyed under Government supervision. All labor performed and services rendered under these provisions shall be under the supervision of a duly designated officer of the customs and at the expense of the manufacturer.

A careful account shall be kept by the collector of all merchandise delivered by him to any bonded manufacturing warehouse, and a sworn monthly return, verified by the customs officers in charge shall be made by the manufacturer containing a detailed statement of all imported merchandise used by him in the manufacture of exported articles.

Before commencing business the proprietor of any manufacturing warehouse shall file with the Secretary of the Treasury a list of all the articles intended to be manufactured in such warehouse, and state the formula of manufacture and the names and quantities of the ingredients to be used therein.

Articles manufactured under these provisions may be withdrawn under such regulations as the Secretary of the Treasury may prescribe for transportation and delivery into any bonded warehouse at an exterior port for the sole purpose of immediate export therefrom: *Provided*, That cigars manufactured in whole of tobacco imported from any one country, made and manufactured in such bonded manufacturing warehouses, may be withdrawn for home consumption upon the payment of the duties on such tobacco in its condition as imported under such regulations as the Secretary of the Treasury may prescribe, and the payment of the internal-revenue tax accruing on such cigars in their condition as withdrawn, and the boxes

or packages containing such cigars shall be stamped to indicate their character, origin of tobacco from which made, and place of manufacture.

The provisions of section 3433 of the Revised Statutes shall, as far as may be practicable, apply to any bonded manufacturing warehouse established under this chapter and to the merchandise conveyed therein.

Distilled spirits and wines which are rectified in bonded manufacturing warehouses, class six, and distilled spirits which are reduced in proof and bottles in such warehouses, shall be deemed to have been manufactured within the meaning of this section, and may be withdrawn as hereinbefore provided, and likewise for shipment in bond to Puerto Rico, subject to the provisions of this section, and under such regulations as the Secretary of the Treasury may prescribe, there to be withdrawn for consumption or be rewarehoused and subsequently withdrawn for consumption: *Provided,* That upon withdrawal in Puerto Rico for consumption, the duties imposed by the customs laws of the United States shall be collected on all imported merchandise (in its condition as imported) and imported containers used in the manufacture and putting up of such spirits and wines in such warehouses: *Provided further,* That no internal-revenue tax shall be imposed on distilled spirits and wines rectified in class six warehouses if such distilled spirits and wines are exported or shipped in accordance with the provisions of this section, and that no person rectifying distilled spirits or wines in such warehouses shall be subject by reason of such rectification to the payment of special tax as a rectifier. June 17, 1930, c. 497, Title III, § 311, 46 Stat. 691; June 26, 1936, c. 830, Title IV, § 404, 49 Stat. 1960."

Federal and State Statutes.

NEW YORK ALCOHOLIC BEVERAGE CONTROL LAW.

Section 3, subdivision 28 of the Alcoholic Beverage Control Law provides:

"§ 3. *Definitions*

"Whenever used in this chapter, unless the context requires otherwise:

* * * * *

"28. 'Sale' means any transfer, exchange or barter in any manner or by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and/or a warehouse receipt pertaining thereto. 'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state."

Section 62 of the Alcoholic Beverage Control Law provides:

"§ 62. *Wholesaler's liquor license*

"Any person may apply to the liquor authority for a license to sell liquor at wholesale. Such application shall be in writing and verified and shall contain such information as the liquor authority shall require. Such application shall be accompanied by a certified check, bank officers' check or draft, or money order for the amount required by this article for such license. If the liquor authority shall deny the application it shall return the fee to the applicant, less fifteen dollars. If the liquor authority shall grant the application it shall issue a

license in such form as shall be determined by its rules. Such license shall contain a description of the licensed premises and in form and in substance shall be a license to the person therein specifically designated to sell liquors at wholesale in the premises therein specifically licensed to duly licensed wholesalers, retailers and permittees in this state, and to sell liquor in bulk to a licensed rectifier or to a permittee engaged in the manufacture of products which are unfit for beverage use, for use in the manufacture of products produced and sold by such rectifier or permittee, and to sell or deliver liquor to persons outside the state pursuant to the laws of the place of such sale or delivery. Such a license shall also include the privilege to sell wine at wholesale under the same terms and conditions without the payment of any additional fee. As amended L. 1947, c. 132; L. 1951, c. 581, § 3, eff. April 6, 1951."

Section 100, subdivisions 1 and 2 of the Alcoholic Beverage Control Law provides:

"§ 100. *Alcoholic beverages generally*

"1. No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter.

"2. No manufacturer and no wholesaler shall sell, or agree to sell or deliver in this state any alcoholic beverage for the purposes of resale to any person who is not duly licensed pursuant to this chapter to sell such beverages, at wholesale or retail, as the case may be, at the time of such agreement and sale."